United States Court of Appeals

for the Second Circuit

REPLY BRIEF

76-1267

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Plaintiff-Appellee, : Docket No. 76-1267

v. :

WILLIAM RODMAN and WILLIAM ROSENBERG, :

Defendants-Appellants. :

----------X

On Appeal From The United States District Court
For The Southern District of New York

REPLY BRIEF FOR APPELLANTS

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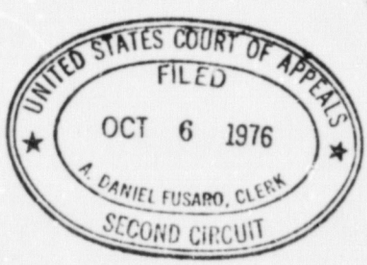
Dated: October 5,1976



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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76-1267

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

WILLIAM RODMAN and WILLIAM ROSENBERG,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANTS

Questions Presented

1. Whether the Government failed to prove beyond a reasonable doubt that the defendants intended and agreed to use the mail in violation of the federal mail fraud and securities fraud statutes.

2. Whether the verdict is contrary to the weight of the evidence and is not supported by substantial evidence.

3. Whether the exclusion of evidence offered through Rosemary Rodman was error.

4. Whether the prosecutor's conference with witness Noonan while the witness was under oath and still subject to cross examin tion was improper and tainted the entire trial.

5. Whether the Appellants were denied a fair trial by reason of the trial court abusing its discretion and arbitrarily permitting the government rebuttal on the day following the conclusion of the Appellants closing argument.

POINT NO. 1

THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE DEFENDANTS INTENDED AND AGREED TO USE THE MAIL IN VIOLATION OF THE FEDERAL MAIL FRAUD AND SECURITIES FRAUD STATUTES

The government's brief contends that the evidence at the trial proved that use of the mail was essential to the success of the scheme to defraud and that in any event, since the holding of the Supreme Court in United States v. Feola, 420 U.S.671 (1975), the government did not have the burden of proving that use of the mail was essential but merely had to prove that the use of the mail could reasonably have been foreseen by the defendants. The position of the government is not substantiated by the Feola case or the other cases cited by the government. The view taken by the government would confer federal jurisdiction in every fraud case except those perpetrated under such circumstances which would preclude use of the mail, telephone or other instrumentalities of interstate commerce. Such was not the intent of the legislature in conferring federal jurisdiction.

An examination of the evidence introduced at the trial fails to establish that use of the mail was essential to the scheme or artifice to defraud. It is not the fact that the confirmations "might" have been hand delivered upon which the defendants rely but

upon the fact that they "could" have been hand delivered. (Italics supplied). It is this fact which makes it clear that use of the mail was not essential to the accomplishment of the fraud.

The government's reliance on the case of United States v. Cohen, 518 F. 2d. 727 (2d. Cir. 1975) for the proposition that mailing of the confirmations was a "necessary step" in the execution of the fraudulent scheme is misfounded. In the case of United States v. Cohen, Supra, there was an actual mailing of twenty nine "count letters." The Court held that with regard to the conspiracy count the government had to prove that the defendants agreed upon all elements of the crime, including use of the mail. Because of the actual use of the mail and the fact that the mailings were to individuals in various states of the United States the Court held that the jury could infer that the defendants agreed and intended to use the mail. It was the extensive interstate mailing upon which the Court predicated its holding not that the mail "might" be used but was "certain" to be used. (Italics Supplied). As the mails were actually used and the defendants knew the mails were being used the jury could reasonably infer that the defendants intended the use of the mail.

The Appellants do not contend that the government had the burden of offering proof to exclude the possibility of delivery of the

confirmations by some medium other than the mails. It is the position of the Appellants that as there was no actual mailing upon which to predicate federal jurisdiction, it was incumbent upon the government to prove that use of the mail was essential to the accomplishment of the fraud before the jury could infer an intent or agreement to use the mail. The possibility or probability that the mail might be used is insufficient to infer an intent or agreement to use the mail when no mailing has taken place. In the case of Mansfield v. United States, 155 F. 2d. 952 (5th Cir. 1946), cited by the Appellants and the government, there were eleven count mailings between California and Texas. The Court held as to the conspiracy count that the rule is that where the accomplishment of the conspiracy contemplates the use of the mails "and such is essential to the execution of the scheme", intent on the part of the Conspirators to use the mails may be inferred. (Italics Supplied). The Court stated that because of the nature of the scheme it could not have been carried out without the use of the mails. The Court stated that the use of the mails was indispensable in carrying out the conspiracy. This is quite different from the use of the mail being probable or being the usual manner of conducting business. Again, in the Mansfield case the mails were actually used and the defendants knew of this actual use and thus it could be inferred that they

intended and agreed to use the mail. In the case of Banister v. United States, 379 F. 2d. 750 (5th Cir. 1967), cited by both the Appellants and the government, there were two counts of mail fraud and one conspiracy count. The scheme was to defraud insurance companies by submitting fraudulent death claims with a local Florida agent who had to mail them to the home office in New York. The defendants knew that the claims were mailed from the local office in Florida to the home office in New York. Again, there were actual mailings and the court held that intent to use the mail could be inferred as use of the mail was required as an integral part of the scheme because inter-office communications between Florida and New York were required and these inter-office communications actually were accomplished by use of the mail.

The government cites the cases of Pereira v. United States, 347 U.S. 1 (1954), and United States v. Finkelstein, 526 F. 2d. 517 (2d. Cir. 1975), for the proposition that:

> "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended that is sufficient."

The foregoing rule of law is applicable where the question is whether a defendant caused the use of the mail and it is for this proposition that it was stated in the Pereira case and Finkelstein

case. In both of those cases the mail was actually used and it was held that under the circumstances the use of the mail was intended.

The government has enlarged upon the holding of the Supreme Court in United States v. Feola, Supra. The proscribed act in the Feola case is to assault a federal employee. The Court held that the substantive statute did not require a specific intent to assault a federal officer and no greater scienter requirement can be engrafted upon the conspiracy offense which is merely an agreement to commit the act proscribed by Section 111 of Title 18 United States Code. To satisfy the substantive statute, all that was required was proof of intent to assault. As there was no requirement that the assailant know that his victim is a federal officer, there is nothing on the face of the conspiracy statute that would seem to require that those agreeing to the assault have a greater degree of knowledge. However, the Court said that if there is an unfulfilled agreement to assault, the intended victim must be specificaliy identified, and if the indentified individual is in fact a federal officer, the agreement may be fairly characterized as one calling for an assault upon a federal officer even though the parties were unaware of the victims actual identity. Thus, the holding in the Feola case is that the substantive crime is complete if a federal agent is assaulted even though the assailant did not know the victim was a federal agent. The conspiracy is complete if the parties agree to assault an

individual who, upon identification, is shown to be a federal agent even if the conspirators did not know he was a federal agent.

It does not follow from the Feola decision that in a case of conspiracy to commit mail fraud it should only be necessary for the government to prove that use of the mails could reasonably have been foreseen by the defendants--the same standard applicable to a substantive offense. The gist of the offense in the Feola case was the assault. To sustain a conspiracy conviction there must be an agreement to assault and sufficient identification to show that the intended victim was a federal agent so that the agreement may be fairly characterized as one calling for an assault upon a federal agent. In mail fraud cases the gist of the offense is the use of the mails. The posting of a "count letter" is the corpus deliciti. United States v. Cohen, 145 F. 2d 82 (2d. Cir. 1944); Weiss v. United States, 122 F. 2d. 675, (5th Cir. 1941). The devising of a scheme to obtain money by means of fraud or false pretenses is not a crime under the laws of the United States, and becomes a crime only in the event that the United States mails are used in carrying out the scheme. Baker v. United States, 115 F. 2d. 533 (8th Cir.1940). In the Feola case to sustain a conspiracy conviction absent an actual assault the agreement must be fairly characterized as one calling for an assault upon a federal agent. In mail fraud cases in order

to sustain a conspiracy conviction absent an actual mailing, the agreement must call for use of the mails. The test applied in the 2nd Circuit to determine whether there was an agreement to use the mail is not whether the use of the mails could reasonably have been foreseen by the defendants. This standard is only applicable to the substantive offense. The test to be applied is whether the scheme could have been carried out without the use of the mails or whether the use of the mail was essential to the execution of the scheme. If the use of the mail was essential to the execution of the scheme and the scheme could not have been carried out without the use of the mail, an agreement and intent to use the mail may be inferred. Farmer v. United States, 223 F. 903 (2d. Cir. 1915).

The government contends that the scheme involved the sale of as much as 150,000 shares of Franklin stock to Noonan's various customers and this permitted an inference that the confirmations would have been mailed. This inference suggested by the government is insufficient to prove an intent and agreement to use the mail under the standard established by Farmer v. United States, Supra, and its progeny. Furthermore, there was no evidence that the Appellant Rodman knew how many shares of stock the Appellant Rosenberg had available for sale. Rodman never discussed with Noonan how many shares of Franklin Properties stock he could sell to his customers

and Rodman never told Noonan an amount to sell (T. pg. 112). In fact, on December 5,1975 during the recorded phone conversation between the Appellant Rosenberg and Noonan, Noonan told Rosenberg that a few things had developed for him. He states to Rosenberg that "In the beginning, I was just going to do you know, maybe just a couple of thousand here and make a few bucks, right" Rosenberg says "Right." Noonan then says: "Now, something's developed where I think I can get a guy to take down about 30,000 shares." He asks Rosenberg whether he can do something like that. Rosenberg says he can. Noonan tells Rosenberg: "The guy would probably hold the stock though, I don't think it'd be coming back to you."

From the foregoing it cannot be inferred that Rodman and Rosenberg had an agreement to sell 150,000 shares of Franklin stock. Noonan was prepared to sell only a couple of thousand shares of the stock and believed he might have someone who would buy 30,000 shares of the stock to hold as a speculation. There is nothing in the evidence to show that Rodman and Rosenberg had conspired to do more than Noonan said he could do. The evidence concerning the agreement between Rodman and Rosenberg does not permit an inference that the scheme could not be executed without the use of the mails.

With regard to the mailing of confirmations. Lewis Scala, the cashier of John Maher Associates testified that John Maher Associates had hand delivered confirmations (T. pg. 42). Arthur Pendrick, the

president of John Maher Associates testified that sometimes customers would come up to the firm and pick up their confirmations by hand. He testified that use of the mail was not essential to consummate the sale or purchase of securities (T. Pg. 406-407). Noonan's testimony was that he "believed" that Leyner, Dreskin only sent confirmations by mail. (T. Pg. 67) (Italics Supplied). His testimony was a statement of opinion and a conclusion. Futhermore, as a registered representative, Noonan was not the proper party to testify concerning the mailing custom of Leyner, Dreskin. Also, he testified that he never told Rodman or Rosenberg of Leyner, Dreskin's custom or practice of mailing confirmations.

POINT NO. II

THE VERDICT IS CONTRARY TO THE WEIGHT OF THE EVIDENCE AND IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The government failed to prove the conspiracy between Rodman and Rosenberg from such non-hearsay facts in evidence as legitimately tend to sustain the inference of the existence of a conspiracy between them.

The government's evidence shows that Rodman introduced Noonan to Rosenberg for the purpose of Noonan and Rosenberg participating with each other in a stock deal. Rodman also made sure that Noonan and Rosenberg had an understanding. This is evident from the recording of the telephone conversation between Noonan and Rodman on December 4,1975. However, the evidence consisting of Noonan's testimony and the recording of the December 4,1975 phone call makes it clear that the deal was to be between Noonan and Rosenberg. The evidence did not show any agreement between Rodman and Rosenberg but on the contrary showed that Rodman didn't want any part of the deal. The rational of United States v. Falcone, 311 U.S. 205, 61 S Ct. 204 (1940) is applicable to the facts of this case. There is no difference between supplying a legal product to a distiller knowing that it would be used to distill illegal spirits and supplying one stock broker to another knowing that they were going to

engage in an illegal stock transaction. There was no evidence that Rodman had a stake in the success of the transaction between Noonan and Rosenberg or that he adopted the conspiracy as his own. Evidence establishing knowledge of another's criminal activity and an aiding of it does not of itself establish conspiracy. United States v. Krol, 374 F 2d. 776 (7th Cir. 1967).

Outside of his introduction of Noonan to Rosenberg, Rodman was not shown to have any further involvement in the alleged conspiracy. An examination of the evidence shows that at most Rodman believed Noonan might sell a couple of thousand shares of Franklin stock and pick up about $500.00 for himself. Noonan did not discuss possibly selling 30,000 shares of Franklin stock until after he contacted Rosenberg and the government. Although the government alleged a giant stock manipulation, the non hearsay evidence showed only that one broker, Noonan, was introduced to Rosenberg so that he could sell 2000 shares of Franklin stock at $1.00 per share.

Rodman was not involved in anything that took place thereafter between Noonan and Rosenberg. Viewed in this light, the evidence was insufficient to establish a conspiracy between Rodman and Rosenberg to sell 150,000 shares of Franklin stock at inflated prices predicated upon the payment of bribes.

POINT NO. III

THE EXCLUSION OF EVIDENCE OFFERED THROUGH ROSEMARY RODMAN WAS ERROR

The evidence in this case showed that the main government witness, Kenneth Noonan had threatened the Appellant Rodman with a gun and was scheduled to testify against Rodman as a government witness in a pending criminal matter in the United States District Court, Southern District of New York and that Rodman knew and was concerned that Noonan was going to testify against him as a government witness.

Against this background, the Appellant Rodman offered the testimony of his wife, Rosemary Rodman. The testimony concerned conversations she had with the Appellant either immediately after Rodman spoke to Noonan or the witness spoke to someone she believed was Noonan and related the conversation to her husband. The testimony was offered to show Rodman's state of mind which was relevant on the issue of his intent to defraud or his actions being wilful and voluntary. As the witness was the Appellant's wife and was called by the Appellant Rodman, it was obvious that the Appellant believed her testimony would be exculpatory. The trial court excluded the testimony.

The Appellant Rodman contends that the exclusion of the testimony constituted error as it affected a substantial right of the

Appellant Rodman. The government contends that as the Appellant Rodman did not make an offer of proof pursuant to Rule 103 (a) (2) Federal Rules of Evidence, on which the Court could rule, the Court did not err in excluding the evidence. The government's contention is erroneous.

The evidence was clearly admissible pursuant to Rule 803 (3) of the Rules of Evidence For United States Courts and Magistrates as an exception to the hearsay rule. The trial court after having been advised that the evidence was being offered to show Rodman's state of mind excluded the evidence because the Court did not agree that the theory counsel for Appellant Rodman was seeking to prove represented the governing substantive law. The trial court having refused to entertain the legal theory for which the evidence was offered, the Appellant Rodman was excused from making an offer of proof. 1 Wigmore, Evidence, Section 17 at Pg. 318 (3d Ed 1940); Weinstein's Evidence, Volume 1, Section 103 Pages 28-29, Greatreaks v. United States, 211 F. 2d. 674 (9th Cir. 1954).

Furthermore, no offer of proof was necessary as the substance of the evidence was apparent from the context within which the questions were asked, the relationship between the witness and the Appellant Rodman and the evidence which had been introduced through the cross examination of the government's witness, Noonan.

The government's position that Mrs. Rodman could not testify

as to her telephone conversation with Noonan is erroneous. Firstly, there was sufficient circumstantial evidence so that the jury could have decided whether the caller was in fact Noonan. Also, the evidence was not offered to prove the truth of any matter asserted but for the purpose of showing Rodman's state of mind when the witness told Rodman of the telephone conversation. The telephone conversation between the witness and Noonan did not violate the hearsay rule. Again, the purpose for which the evidence was offered and the substance of the evidence was apparent from the context in which the questions were asked, the relationship between the witness and the Appellant Rodman and the other evidence already in the case.

The evidence was clearly relevant and probative on the issue of Rodman's state of mind and in particular whether he had an intent to defraud and whether he was acting voluntarily and wilfully. The exclusion of this evidence caused severe prejudice to the Appellant Rodman and affected a substantial right of the Appellant.

POINT NO. IV

THE PROSECUTOR'S CONFERENCE WITH THE WITNESS NOONAN WHILE THE WITNESS WAS UNDER OATH AND STILL SUBJECT TO CROSS EXAMINATION WAS IMPROPER AND TAINTED THE ENTIRE TRIAL

Kenneth Noonan was the main government witness against the Appellants. During cross examination by the attorney for the Appellant Rodman it became apparent that the witness was lying. During a recess, the prosecutor spoke to the witness about his testimony. This was discovered by the attorneys for the Appellants. It was not disclosed by the prosecutor or the witness prior to the discovery by the Appellants attorneys. The government states that "The only detriment they suffered was the they were deprived of an opportunity to attack a patently erroneous or even deliberately false allegation because it was corrected truthfully by the witness."

In fact, however, the tactic employed by the government disabled the Appellants attorneys from attacking the witness in areas in which his testimony was not "patently" false or erroneous. It prevented the Appellants attorneys from discrediting the witness generally. It bolstered the witness before the Appellants attorneys could use the false testimony to discredit the witness.

This case was a retrial. The trial court in the previous trial instructed counsel against speaking to witnesses while they were still subject to cross examination. Judge Gagliardi presided at the first trial and re-trial. Counsel knew they were not

to speak to witnesses during cross examination. Whether the witness was testifying falsely or truthfully was not for the prosecutor or defense counsel to determine. This is a question which must be left to the jury. By the prosecutor speaking to the witness during his cross examination he could only tell the witness how the testimony sounded to him and what he believed to be true. He thus can prompt the witness so that his testimony would correspond with what the prosecutor believes is the truth. In effect,it is the prosecutor who then speaks through the witness. If the prosecutor believed the witness was being untruthful, it was his duty to advise the court so that the court could consider the matter and then instruct the jury if he believed it is necessary to do so in the interest of justice.

By speaking to the witness the prosecutor prompted the witness and usurped a function of the court. The conduct of the prosecutor tainted the trial and resulted in Appellants being denied a fair trial.

The cases cited by the government do not sustain its position that counsel can confer with a witness during cross examination. The government cites the case of Frazer v. United States, 233 F. 2d. 1 (9th Cir. 1956) for the proposition that the conduct of the prosecutor was "commendable". However, the facts of the Frazer case make it inapplicable to the case on appeal. In the Frazer case the witness was still on direct examination by the government. The witness

lied by testifying he did not receive compensation from the government. Of course, the government having paid the compensation knew that the witnesses testimony was untrue. This was not a matter of the prosecutor "believing' the testimony was untrue. (Italics Supplied). Furthermore,the government was obligated to inform defense counsel of compensation paid to its witness and thus was obligated to remind the witness of having received the compensation.

The case of Fong Foo v. United States, 369 U.S. 141 (1962), also cited by the government does not support the position of the government but on the contrary is supportive of the Appellants contention. In this case the District Court directed a judgment of acquittal after having excused the jury and excoriated counsel. The prosecutor during a recess period "refreshed" the witnesses memory while still on direct examination. The Court of Appeals held that the District Court was without power to direct the judgment of acquittal. However, the decision of the Court indicates that a mistrial would have been proper. The Appellants in the case at bar sought a mistrial but their motion was denied. The case of In Re United States, 286 F. 2d. 556 (1st Cir. 1961) also cited by the government holds that the United States Attorney is not guilty of any misconduct or impropriety if he talks to a government witness during a recess while the witness is still on direct examination. However, the court stated that as a matter of trial tactics it is usually

avoided. This case did not deal with a prosecutor discussing a government witnesse's testimony during a recess while the witness was still being cross examined by the defense.

This case was a retrial presided at by Judge Gagliardi who presided at the first trial. The two trials were only weeks apart. During the first trial Judge Gagliardi imposed the rule on witnesses. During the retrial he repeatedly advised counsel of admonishions he made during the first trial and stated they need not be repeated. Furthermore, Counsel in the United States District Court for the Southern District of New York are familiar with the fact that the rule on witnesses applies. Judge Gagliardi acknowledged that the prosecutor should have known that the rule applied. The Supreme Court of the United States in Geders v. United States. 96 S Ct. 1330 (1976) acknowledged the importance of the Rule on Witnesses in assuring a fair trial.

Not only was the prosecutor's conduct inexcusable even if done in good faith, it interferred with counsels cross examination of the main government witness, prevented counsel from discrediting the witness and usurped a function of the Court.

POINT NO. V

THE APPELLANTS WERE DENIED A FAIR TRIAL BY REASON OF THE TRIAL COURT ABUSING ITS DISCRETION AND ARBITRARILY PERMITTING THE GOVERNMENT REBUTTAL ON THE DAY FOLLOWING THE CONCLUSION OF THE APPELLANTS CLOSING ARGUMENT.

The government has attempted to make it appear that the Court did not abuse its discretion in adjourning the government's rebuttal because the Appellants counsel allegedly "overstepped the bounds of propriety during the trial and in summation remarks." The trial courts opinion of the conduct of both defense counsel is set forth in the government's brief at pages 17 and 18. Although Appellants have not raised the issue of the trial judges attitude towards their counsel and the effect it could have had on the effectiveness of their respesentation, the Appellants believe there is nothing in the record which should have precipitated the remarks of the trial judge.

Prior to commencing summations each counsel stated that their summation would take between thirty and forty minutes. The governwas reminded that is rebuttal should be "really a brief rebuttal and not a re-summation or anything else." After the government completed its summation, counsel for the Appellant Rodman became concerned about completing the remaining summations and the government's rebuttal that day as the government's summation exceeded its estimate.

The Court was asked whether summations and rebuttal would be completed. The Court stated: "We had better finish the summations and the rebuttal tonight." It was this point that the government apologized for going long beyond the time it predicted. The Court then stated: "Well, we will take it off the other end."

It was only 6:15 P.M. when the Appellants counsel completed their summations. In view of the fact that the government's rebuttal should have taken only ten minutes, the Court abused its discretion by permitting the jury to decide whether it wanted to adjourn to the following morning to hear the government rebuttal. The trial court should, when exercising its discretion, take into consideration the reasonable needs and strategies of counsel. This was not done and the effect was to give the government a tactical advantage which was tantamount to denying Appellants a fair trial.

CONCLUSION

For the above stated reasons the judgment should be reversed.

Respectfully submitted,

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Dated: October 5,1976

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief has been furnished by mail this 5th day of October, 1976, to John A. Lowe, Assistant United States Attorney, United States Department of Justice, Southern District of New York, United States Courthouse, Foley Square, New York, New York, 10007.

Morton Berger

MORTON BERGER